Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

19 CFR Part 177

(T.D. 92–115)

RULINGS CONCERNING MARKING OF TOY, IMITATION, AND LOOK-ALIKE FIREARMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that Customs will no longer issue prospective ruling letters concerning the Department of Commerce's marking requirements applicable to toy, imitation, and look-alike firearms imported into the U.S., as decisions regarding this subject matter fall under the jurisdiction of the Department of Commerce.

EFFECTIVE DATE: December 11, 1992.

FOR FURTHER INFORMATION CONTACT: Timothy P. Trainer, Intellectual Property Rights Branch (202) 482–6960.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4 of the Federal Energy Management Improvement Act of 1988 (Public Law 100–615, codified at 15 U.S.C. 5001), provides, in part, that it shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce. Thus, the Department of Commerce is the agency charged with promulgating certain marking requirements applicable to toy, imitation, and look-alike firearms. See, *Wagner Seed Company, Inc. v. Bush,* 946 F.2d 918 (D.C.C. 1991), *cert. denied.* Part 1150 of the Commerce and Foreign Trade Regulations (15 CFR Part 1150) implements the Department of Commerce's marking requirements and exceptions under 15 U.S.C. 5001.

The U.S. Customs Service serves as the principle border enforcement agency of the U.S. Government regarding the entry of merchandise into

the United States, with responsibilities including insuring that merchandise entered is properly marked as required by other government administrative agencies charged with marking responsibilities. However, this enforcement function does not include the issuance of prospective ruling letters concerning other agency's regulations, under the provisions of Part 177, Customs Regulations (19 CFR Part 177), which provides for the issuance of certain administrative rulings. Although some rulings have been issued in the past pursuant to importer's requests, it is Customs' position that the appropriate authority to interpret Commerce's regulations concerning acceptable markings on this merchandise is the Department of Commerce. Thus, although Customs responsibilities include preventing the entry into the United States of any imported toy, look-alike, or imitation firearm that is not marked in accordance with the Secretary of Commerce's marking requirements, Customs does not believe that its responsibilities include interpreting the meaning of the Department of Commerce's statutory authority to determine what constitutes acceptable marking regarding toy, imitation, and look-alike firearms.

Accordingly, since the Department of Commerce is the proper administrative agency to interpret its own regulations, Customs will no longer issue prospective rulings under Part 177 of its regulations concerning the Department of Commerce's marking requirements applicable to imported toy, imitation, and look-alike firearms.

Approved: December 3, 1992.

SAMUEL H. BANKS,
Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, December 11, 1992 (57 FR 58706)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–211)

BROTHER INDUSTRIES (USA), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., DEFENDANT-INTERVENOR

Court No. 91–11–00794

[Enforcement of judgment ordered.]

(Dated November 30, 1992)

Tanaka Ritger & Middleton, (Patrick F. O'Leary), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, United States Department of Justice, Civil Division, Commercial Litigation Branch (*Patricia L. Petty*); *Dean A. Pinkert*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart, (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and *Charles A. St. Charles)*, for defendant-intervenor.

OPINION

RESTANI, *Judge:* Brother Industries (USA), Inc. ("BIUSA") seeks enforcement of the court's judgment of September 3, 1992, which requires the Department of Commerce to proceed with the next step of its investigation; that is, to determine whether an antidumping petition has been filed on behalf of the relevant domestic industry, and if so, to proceed with the remainder of the investigation.

The starting point of analysis is the presumption that appealed judgments of this court must be complied with upon expiration of thirty days from entry, unless a stay is granted pending appeal or a statute prevents immediate enforcement. *See* USCIT R. 62(a), (d) (judgments shall not be enforced or executed until thirty days after entry; stay may be granted pending appeal). The issue is whether 19 U.S.C. §§ 1516a(c) and 1516a(e) prohibit enforcement in the absence of a stay.

19 U.S.C. §§ 1516a(c)(1) and 1516a(e) read as follows:

> **(c) Liquidation of entries**
>
> **(1) Liquidation in accordance with determination**
>
> Unless such liquidation is enjoined by the court * * * entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are en-

> tered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.
>
> * * * * * * *
>
> **(e) Liquidation in accordance with final decision**
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision,
>
> * * * * * * *
>
> shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. §§ 1516a(c)(1), 1516a(e) (1988). These sections determine the effect of legal action on liquidation of entries. As the court has indicated previously, these sections apply only to court decisions adverse to Commerce that affect liquidation. *See Consol. Int'l Automotive, Inc. v. United States,* 16 CIT ____, Slip Op. 92–54, at 3 (Apr. 8, 1992) (liquidation suspended previously; changes in deposit rates not result of court decision adverse to Commerce); *cf. Badger-Powhatan v. United States,* 10 CIT 454, 455 n.2, 638 F. Supp. 344, 346 n.2 (1986) (prior to October 30, 1984, annual reviews to set duty rates for liquidation purposes were mandatory; accordingly, judgments affecting original investigation deposit rates did not affect liquidation and were not governed by 19 U.S.C. §§ 1516a(c) and (e)).

The court's judgment in this action requires Commerce to proceed with its investigation. The investigation may result in suspension of liquidation and eventual liquidation of entries at the rate established in the investigation. Thus, the court's decision has at least potential effect on liquidations. Therefore, a close examination of the applicable sections and the cases interpreting them, notably *Timken Company v. United States,* 893 F.2d 337 (Fed. Cir. 1990) and *Smith Corona Corp. v. United States,* 915 F.2d 683 (Fed. Cir. 1990), is required.

In *Timken Co.* the court specifically held that under 19 U.S.C. § 1516a(e) liquidation of entries should not take place in accordance with a court decision adverse to the Commerce Department until the decision is final in the sense that appellate remedies have been exhausted.

893 F.2d at 339–40. It made clear, however, that suspension of liquidation *should* be affected by adverse court decisions so that if the decision is affirmed on appeal, liquidation of entries made subsequent to the court decision will take place in accordance with the court's decision.[1] *Id.* at 341.

The court also distinguished *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984), wherein the Court of International Trade had ordered recision of a negative determination. 893 F.2d at 341. The court found that *Melamine* did not involve a final appealable determination, and rejected as *dicta*, language in *Melamine* applying 19 U.S.C. § 1516a broadly to prevent implementation of court decisions. *Id. Smith Corona* is in accord. 915 F.2d at 688.

The court concludes that in the absence of a stay *Timken* requires Commerce to proceed at once with implementation of the court decision, and if the investigation results in a preliminary affirmative determination, to suspend liquidation.

(Slip Op. 92–212)

AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND CEMEX, S.A., DEFENDANT-INTERVENOR

Court No. 90–10–00508

[Remand determination sustained.]

(Dated November 30, 1992)

Kilpatrick & Cody (*Joseph W. Dorn, Martin M. McNerney, Gregory C. Dorris* and *Damon V. Pike*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*), *Diane M. McDevitt*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher & Flom (*Thomas R. Graham* and *John J. Burke*) for defendant-intervenor Cemex, S.A.

OPINION

RESTANI, *Judge:* Pursuant to a court ordered remand, the Department of Commerce, International Trade Administration ("ITA" or "Commerce") recalculated the final dumping margins for sales of gray portland cement by Cemex, S.A. ("Cemex") and the "all others" category of Mexican importers of such cement. *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 16 CIT ___, ___, Slip Op. 92–24 at 15 (March 5, 1992) (court ordered remand). These

[1] To be exact, the entries affected will be those "entered, or withdrawn from warehouse, for consumption after the date of publication * * * of a notice of the court decision * * *." 19 U.S.C. § 1516a(e).

recalculations were based on a comparison of sales without segregation by level of trade. Defendant-Intervenor Cemex objects to Commerce's redetermination methodology and the resulting increase in the final dumping margins.

I. Background

Following a petition filed by plaintiff Ad Hoc Committee of Arizona, New Mexico, Texas and Florida ("Ad Hoc"), ITA initiated an antidumping investigation of imports of cement from Mexico. *Gray Portland Cement and Clinker from Mexico,* 54 Fed. Reg. 43,190 (Dep't Comm. 1989). In the resulting final determination, ITA compared sales for both U.S. and home markets at two separate levels of trade (i.e. distributor to distributor, end-user to end-user). ITA concluded that imports of gray portland cement from Mexico were being sold in the United States at less than fair value and calculated the dumping margins of 58.38% for Cemex and 58.05% for the "all other" category of Mexican producers and exporters of the subject merchandise. *Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 29,244, 29,253 (Dep't Comm. 1990) (final determ.).

Upon appeal, this court found that ITA's reasoning was unclear and did not "reflect that ITA found two distinct levels of trade in each market." *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 16 CIT ____, ____, Slip Op. 92–24 at 5 (1992). Commerce consented to a remand to reconsider the level of trade issue. *Id.*

On remand, ITA stated that its initial comparison of sales at two distinct levels of trade was not based upon substantial evidence in the administrative record. Following a determination of (1) a lack of correlation between Cemex's claimed selling expenses and levels of trade and (2) Cemex's admission that its prices were set according to regions in which the merchandise was sold rather than according to types of customers, ITA compared sale prices without separating them into two levels of trade. This resulted in revised dumping margins of 60.33% for Cemex. Currently, defendant Commerce and plaintiff Ad Hoc are in agreement as to the results of the redetermination on this issue. Defendant-Intervenor Cemex requests the court to reinstate Commerce's initial dumping margin determination of 58.38% or, in the alternative, mandate Commerce to compare sales at two distinct levels of trade.

II. Discussion

A. *What Constitutes Sales at Different Levels of Trade:*

As a preliminary issue, this court will address Commerce's finding of distinct "commercial levels of trade." Title VII of the Tariff Act of 1930 provides for the imposition of antidumping duties whenever Commerce determines that imported merchandise is being, or is likely to be, sold in the United States at less than fair value. 19 U.S.C. § 1673 (1988). The Commerce Department will find sales at less than fair value if the

United States price of the imported merchandise is lower than the foreign market value of the merchandise (i.e. sales price of same or similar merchandise in the home market). *Id.* §§ 1673, 1677b(a)(1).

Commerce has specified by regulation how the comparison between U.S. and foreign market value is to be made. The applicable regulation provides:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability.

19 C.F.R. § 353.58 (1992) ("regulation"). Normally Commerce will determine whether different levels of trade exist by looking at the type and function of the first unrelated buyers in the chain of commerce ("functional test"). *Potassium Permanganate From Spain,* 56 Fed. Reg. 58,361, 58,364 (Dep't Comm. 1991) (final admin. review).

Cemex contends that there are distinct commercial levels of trade because it sells cement to both distributors and end-users in each market. Application of the functional test in this case indicates that Cemex did in fact sell cement at different levels of trade in each market.

Cemex specifically identified sales in both home and U.S. markets as being made either to a distributor or to an end-user; Commerce verified this information. The nature of the purchaser is a key element of the functional test, as demonstrated by this Court's past statement that "[w]holesale, retail, and end-user sales * * * each represent different levels of trade." *NAR, S.p.A. v. United States,* 13 CIT 82, 84, 707 F. Supp. 553, 556 (1989). Similarity of products and volume and quantity of sales made to a specific customer may also be considered, but are not determinative. *See Calcium Hypochlorite From Japan,* 50 Fed. Reg. 7,941, 7,942 (Dep't Comm. 1985) (final determ.). This brings us to the primary issue in this case: whether despite the existence of distinct functional levels of trade, Commerce may compare prices without segregating sales into such levels.

B. *Commerce's Use of the Correlation Test in Levels of Trade Comparison:*

Cemex argues that once Commerce has determined that distinct functional levels of trade exist, 19 C.F.R. § 353.58 mandates calculation of foreign market value by comparing sales at such levels of trade separately. Cemex bases this contention on what it gleans to be the plain meaning of the regulation and Commerce's previous decisions, all of which allegedly point towards a narrow and rigid construction of the regulation.

Commerce, in its final remand redetermination, states that the existence of functionally different levels of trade does not mandate price

comparison at such levels. It asserts that sales to different types of customers create a rebuttable economic presumption that the levels of trade to which one sells have an impact on price and, ultimately, on fair market value. In some cases, Commerce deems it sufficient to look only at the type and function of the purchaser in the chain of commerce to determine whether comparisons should be made at single levels of trade. If one of the parties rebuts the economic presumption, Commerce will apply a correlation test. Under that test, if there is a lack of correlation between prices, selling expenses and levels of trade, Commerce rejects comparison of sales at separate levels of trade.[1]

Commerce further asserts that (1) 19 C.F.R. § 353.58 affords it discretion in choosing a method for optimal price comparison and such discretion comports with the overall goal of the antidumping statute; and (2) Commerce has widely used the correlation test in its past decisions and the only change in its methodology in this case was the addition of the selling expense factor to the correlation test.

1. *Past Practice:*

Cemex argues that Commerce's decision here is merely an *ad hoc* determination at odds with previous practice. Commerce's past decisions indicate that Commerce has applied the correlation test in some cases. In one case Commerce used both foreign manufacturer's pricing policy and its selling expenses as two prongs of the correlation test. *Tubes for Tires, Other Than for Bicycle Tires, From the Republic of Korea,* 49 Fed. Reg. 26,780, 26,781 (Dep't Comm. 1984) (final determ.). In *Tubes for Tires,* Commerce based the weighted average of home market prices on sales to all classes of customers because respondent failed to establish a correlation between price, selling expenses and levels of trade between wholesalers in both home and U.S. markets. *Id.* at 26,782. In another case, although the respondent alleged that different levels of trade existed, Commerce calculated the fair market value based on all sales in U.S. and home markets because respondent did not establish a correlation between prices and levels of trade. *Porcelain-On-Steel Cooking Ware From Mexico,* 55 Fed. Reg. 21,061, 21,065 (Dep't Comm. 1990) (final admin. review).

Cemex relies upon some of Commerce's past decisions in which Commerce did not utilize the correlation test. These decisions, however, are distinguishable from the present case and seem to represent a different line of cases, wherein lack of correlation was not raised as an issue. In *Certain Stainless Steel Sheet and Strip Products from France,* 48 Fed. Reg. 19,441, 19,444 (Dep't Comm. 1983) (final determ.), Commerce denied respondent's request for adjustments for differences in levels of

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[1] Ad Hoc contends that Cemex's sales to different types of customers do not automatically lead to the conclusion that sales at different levels of trade exist because Commerce did not find a consistent correlation between Cemex's prices, selling costs and levels of trade. Ad Hoc and Commerce differ on the time of application of the correlation test. Ad Hoc argues that the test is a pre-requisite for determining the existence of distinct levels of trade. Therefore, consistent correlation between prices and selling expenses and levels of trade will indicate the existence of distinct levels of trade, at which point the regulation will apply, mandating separate price comparisons. While this may be a reasonable interpretation of the regulation, Commerce's own reasonable interpretation of the regulation is sustained. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

trade and, finding sufficiency of sales, used corresponding levels of trade in the U.S. and foreign markets for comparison purposes. There is no indication that Commerce considered sufficiency of sales as the sole prerequisite for all cases.

In *Calcium Hypochlorite From Japan,* 50 Fed. Reg. at 7,942, there were no corresponding levels of trade for granulated calcium hypochlorite. As a result, Commerce compared prices of respondent's sole customer in the home market with prices at the most comparable level of trade in the U.S. market, disallowing an adjustment for selling expenses because of a lack of data as to a corresponding level of trade. *Id.* at 7,943. The issue at hand seems not to be presented.

One case does seem to support Cemex's view. In *Oil Country Tubular Goods From Canada,* 56 Fed. Reg. 38,408, 38,416 (Dep't Comm. 1991) (final admin. review), Commerce evaluated respondent's foreign market value at corresponding levels of trade despite respondent's contention that segregation into levels of trade was not warranted due to a lack of difference between prices to distributors and end-users. Commerce, in explaining its decision, stated that it will adjust for differences in prices between levels of trade if, due to an insufficiency in the number of sales, it calculates foreign market value based upon a single level of trade. *Id.* The most that can be gathered from this decision is that one case supports Cemex. A solitary case, however, does not constitute a consistent past practice that Commerce is compelled to follow, especially in view of the number of cases which apply the correlation test.

2. *Interpretation of the Regulation and Statutory Antidumping Goals:*

Cemex also argues that words such as "will"[2] in the regulation leave Commerce no discretion in applying the regulation.[3] The court disagrees. Although such words usually do convey a command rather than a discretionary choice, both the United States Supreme Court and this court have recognized an exception to this mode of statutory construction: "as against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Barnhart v. United States,* 5 CIT 201, 203, 563 F. Supp. 1387, 1389 (1983), quoting *Railroad Co. v. Hecht,* 95 U.S. 168, 170 (1877). Determining whether the term "shall" indicates a mandatory or directory meaning depends on both Congressional intent and the context. *Sea-Land Serv., Inc. v. United States,* 14 CIT ____, ____, 735 F. Supp. 1059, 1062 n.5 (1990). As with a statute, the intent of a regulation may best be determined by its language. The regulation states "normally will". To the extent the regulation is mandatory, the mandate does not apply to abnormal situations. Cemex argues that the remainder of the regulation defines the only abnormal situation as insufficient sales at correspond-

[2] "Will" is defined as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must.'" Black's Law Dictionary (6th ed. 1990).

[3] Cemex's arguments based on Article 2.6 of the General Agreement on Tariffs and Trade Anti-dumping Code follow its basic regulatory argument. *See* Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, *entered into force* Jan. 1, 1980, art. 2.6, 26 B.I.S.D. 171, 173. The court sees no conflict with GATT as Commerce's method preserves a fair price comparison.

ing levels of trade. The court views insufficiency as a normal situation for which a sensible solution, based on necessity, is provided in the regulation. Failure of levels of trade to affect prices, however, is reasonably interpreted to be an abnormal situation.

Furthermore, upholding Cemex's narrow construction of the regulation would take away Commerce's ability to adapt to the factual peculiarities of each case in calculating dumping margins. Cemex does not provide any evidence to show that Commerce intended to severely limit its discretion when it used the words "normally will" in the regulation rather than "may".

Interpretation of the regulation must comport with the antidumping goal of the applicable statutes (i.e. 19 U.S.C. §§ 1673 and 1677). A narrow interpretation of the regulation and the resulting limitation upon Commerce's discretion is not consistent with this goal. If a party consistently sells goods to distributors at lower prices than to end-users, there is an obvious economic relationship between such prices and levels of trade. In that case, provided that sufficient sales exist at these levels in both U.S. and home markets, prices can be compared at corresponding levels of trade. If levels of trade are disregarded in setting prices and pricing to accommodate "competitive regions" is used instead, mandating Commerce to compare these prices by segregating sales by levels of trade may facilitate dumping within a particular region.

As indicated, Cemex admits that its prices are set according to regional competitive markets rather than by types of customers. The court sustains Commerce's factual determination that the record, including Cemex's own Pearson Correlation Coefficient data, reflects weak correlation between prices and selling expenses and levels of trade. Cemex, in addition, argues that a change in the dumping margin evidences the requisite relationship between prices and levels of trade, thus fulfilling the correlation test. Given the myriad of factors which affect margins, it is not possible to conclude that a less than 2% increase in the dumping margin indicates a correlation between prices and levels of trade.

Commerce, in its final remand redetermination, reasonably applied the pertinent regulation to this case. Commerce normally presumes a direct relationship between functional levels of trade and sale prices and selling expenses, and compares prices without regard to the corresponding levels of trade only if the economic presumption is rebutted. In this case, Ad Hoc successfully rebutted the presumption by establishing that Cemex set its prices according to "competitive markets" rather than a consistent pricing policy due to different levels of trade. Therefore, Cemex's contention that Commerce erroneously shifted to it the burden of proving the presumption is without merit.

Commerce's use of the correlation test in this case is in accordance with almost all its past decisions and reflects a reasonable interpretation and application of its own regulation with due regard to the purpose of the statute, as well as international agreements.

(Slip Op. 92–213)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 90–06–00290

[ITA determination sustained.]

(Dated December 1, 1992)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Amy S. Dwyer*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael S. Kane*); *Patrick Gallagher*, Attorney Advisor, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Hauer & Feld, L.L.P. (*Patrick F.J. Macrory, Spencer S. Griffith* and *Lydia C. Lundstedt*) for defendant-intervenor, Flores Dos Hectareas.

Arnold & Porter (*Lawrence A. Schneider, Michael T. Shor* and *Susan G. Lee*) for defendant-intervenors, Asocolflores, et al.

OPINION

RESTANI, *Judge:* In this action, plaintiff, Floral Trade Council of Davis, California ("FTC") and one of the defendant-intervenors, Flores Condor de Colombia ("Condor"), challenge certain aspects of *Final Results of Redetermination Pursuant to Court Remand, Floral Trade Council of Davis, California v. United States* ("*Final Remand Results*"), issued on May 5, 1992 by the United States Department of Commerce, International Trade Administration ("ITA").

BACKGROUND

On May 17, 1990, ITA issued the final results of the second antidumping duty review of certain fresh cut flowers from Colombia for the period March 1, 1988 through February 28, 1989. *Certain Fresh Cut Flowers From Colombia,* 55 Fed. Reg. 20,491 (Dep't Comm. 1990) ("*Final Results*"). FTC and defendant-intervenors, Asociacion Colombiana de Exportadores de Flores, its individual members, and 201 individual growers and exporters ("Asocoflores"), challenged the *Final Results* before this court. On September 27, 1991, the court issued a decision remanding the case to ITA. *Floral Trade Council v. United States,* 15 CIT ____, 775 F. Supp. 1492 (1991). The court held, *inter alia,* that ITA erred in rejecting adjustments claimed by Flores Dos Hectareas ("Hectareas") and Flores La Valvanera ("Valvanera") for abnormally low yields due to collapse of a water table and a viral attack. *Id.* at ____, 775 F. Supp. at 1505. The court found that Hectareas and Valvanera provided ITA sufficient information as to the unusual nature of the events and their expected production levels to require ITA to consider the adjustments further. *Id.* In addition, the court held that, in the absence of a specific request for cost data, ITA was not authorized to use best information

available ("BIA") as constructed value for companies that did not voluntarily submit cost data, including Universal Flowers ("Universal"), Flores Bachue ("Bachue"), Dianticola Colombiana ("Dianticola") and Flores Condor ("Condor"). *Id.* at ____, 775 F. Supp. at 1498–99. The court remanded to provide Hectareas and Valvanera an opportunity to supplement the record and to permit ITA to collect cost data from Universal, Bachue, Dianticola and Condor. *Id.* at ____, 775 F. Supp. at 1499.

On remand, in response to ITA's supplemental questionnaire, Hectareas and Valvanera explained why their disasters qualified as "extraordinary" events, as defined under U.S. Generally Accepted Accounting Principles (GAAP). In addition, Hectareas and Valvanera explained how Colombian GAAP would define an extraordinary event. Administrative Record, Public Document ("Pub. Doc.") 29, at 3–4; Pub. Doc. 26, at 2. Universal, Bachue, Dianticola and Condor (and the seven other companies which had not submitted cost data) submitted the requested cost data. In its response to ITA's supplemental questionnaire, Condor amortized preproduction expenses incurred during the period of review for flowers sold thereafter.

On May 5, 1992, ITA issued the *Final Remand Results*. ITA determined that Hectareas and Valvanera established that their expenses resulted from collapse of the water table and severe viral infestation, requiring normalization of these expenses for purposes of the constructed value calculation. *Final Remand Results,* at 21–22. ITA used industry averages as best information available to quantify the normalization adjustment. *Id.* Furthermore, ITA held that the data submitted by Universal, Bachue and Dianticola were accurate. *Id.* at 5–11. In addition, ITA determined that Condor could not amortize its preproduction expenses. *Id.* at 10.

FTC and Condor challenge the *Final Remand Results* before this court. FTC argues that there was insufficient evidence to conclude that the collapse of Hectareas' water table and the viral attack to Valvanera's plants were extraordinary events that called for a normalization adjustment. In addition, FTC argues that ITA erred in using industry averages as best information available to quantify the normalization adjustment for Hectareas and Valvanera. Furthermore, FTC claims that the questionnaire responses submitted by Universal, Bachue and Dianticola were unverified, unexplained and insufficient, and should not be relied upon for purposes of calculating constructed value. Condor argued that ITA erred in rejecting amortization of its pre-production expenses.[1]

Standard of Review

ITA's decision will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind

[1] The court grants Condor's motion to file a reply and has also considered the government's response to that motion.

might accept as adequate to support a conclusion." *N.A.R., S.p.A. v. United States*, 14 CIT ___, ___, 741 F.Supp. 936, 939 (1990) (quoting *Gold Star Co. v. United States*, 12 CIT 707, 708–709, 692 F. Supp. 1382, 1383–84 (1988), *aff'd sub nom., Samsung Electronics Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989)).

Discussion

I. FTC Challenges

A. *Extraordinary Event:*

The issue is whether Hectareas' and Valvanera's responses to ITA's supplemental questionnaire support the conclusion that the collapse of the water table and the viral attack were extraordinary events.

Colombian GAAP defines "extraordinary" event in a manner similar to U.S. GAAP. To be considered an "extraordinary" event giving rise to extraordinary treatment under U.S. GAAP, the event must be unusual in nature and infrequent in occurrence. An event is "unusual in nature" if it is highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment. An event is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future. FASB, *Accounting Standards Current Text, General Standards* ("FASB") § 17.107, at 24,468–69; Appendix 1 to Floral Trade's Memorandum in Opposition to Remand Results.

(1) Hectareas.

The evidence contained in Hectareas' response to ITA's supplemental questionnaire substantially supports the conclusion that the collapse of the water table was an extraordinary event. Prior to building, geological studies had been prepared to assess the appropriate location, depth and capacity of the well. Pub. Doc. 29, at 2–3. During the first five months after planting, the well functioned normally, and was proven to have capacity for twelve hectares of flower production. *Id.* at 9. In the sixth month, however, the well produced barely enough water to irrigate two hectares of the farm. *Id.* at 2. Hectareas stated that: "The failure of the well was not due to a mechanical problem, equipment failure or unusual weather conditions. The well failed, instead, because the water table supplying water to the well suddenly and unexpectedly collapsed." *Id.* Due to the lack of water resulting from the collapse, plants began to die, and the flowers were smaller than normal and had weak stems. *Id.* at 9. Many flowers, which would otherwise have been available for export, were sold in the home market instead. *Id.* at 10. Therefore, there is sufficient evidence to conclude that the collapse of the water table was highly abnormal. Furthermore, the record establishes that the collapse of the water table is not related to Hectareas' business, in the sense that it was not caused by flower production. Accordingly, the water table collapse may be viewed as "unusual."

During the history of Agrodex, the group of twenty-two farms to which Hectareas belonged at the time of the review, a water table had

never collapsed. *Id.* at 3, 12. Therefore, the conclusion that the collapse of the water table was an event which was infrequent in occurrence was also substantially supported.

(2) Valvanera.

The evidence contained in Valvanera's response to ITA's supplemental questionnaire likewise substantially supported the conclusion that the virus attack was an extraordinary event. The virus that attacked Valvanera's pompon plants during the period of review was unknown in Colombia, and its attack was completely unexpected. Pub. Doc. 26, at 1. Valvanera was required to send samples of the diseased flowers to the United States for analysis, as they could not be analyzed in Colombia. *Id.* Although certain types of viruses are considered normal, the virus at issue is not common for pompons in Colombia and the virus caused an extremely adverse impact on production. *Id.* at 8–9. It was not error to conclude that the virus was unusual.

Furthermore, the record demonstrates that due to the steps taken by Valvanera to prevent recurrence of the virus, it is unlikely that a virus of this severity, with its significant loss in production, will occur in the future. *Id.* at 9–10. Therefore, the conclusion that the virus at issue was an event infrequent in occurrence also is substantially supported.

(3) Financial Statements.

FTC argues that ITA erred in classifying the expenses as "extraordinary," because Hectareas and Valvanera did not treat them as such in their financial statements.

It has been ITA's practice to base its treatment of certain expenses on the treatment respondents accord those items in their financial statements, if they are consistent with GAAP and do not distort costs. *See, e.g., Titanium Sponge From Japan,* 57 Fed. Reg. 557, 561–62 (Dep't Comm. Jan. 7, 1992) (final results); *Oil Country Tubular Goods From Canada,* 51 Fed. Reg. 15,029, 15,031 (Dep't Comm. 1986) (final determination of sales at less than fair value).

Hectareas' and Valvanera's financial statements did not mention the collapse of the water table and the viral attack as extraordinary events; therefore, they were not consistent with U.S. and Colombian GAAP, as ITA found. *Final Remand Results,* at 21–23. Blind adherence to the accounting methods chosen by respondents would not yield a result properly reflective of costs. ITA is allowed to prefer substance over form. ITA's determination on this point was adequately supported and will be sustained.

B. *Use of Industry Averages As Best Information Available:*

The issue is whether substantial evidence supports ITA's use of industry averages as BIA. ITA may use BIA whenever a party "refuses or is unable to produce information requested in a timely manner and in the form required." 19 U.S.C. § 1677e(c)(1988); *see also* 19 C.F.R. § 353.37(a) (1992). ITA has broad discretion in selecting BIA. *See N.A.R., S.p.A.,* 14 CIT at ____, 741 F. Supp. at 942; *Timken Co. v. United States,* 11 CIT 786, 789, 673 F. Supp. 495, 501 (1987).

ITA used industry averages as BIA to quantify the normalization adjustment because actual historical data was not available for Hectareas and Valvanera. *Final Remand Results,* at 21–22. Hectareas had no data available because the crop at issue was its first. *See* Pub. Doc. 29, at 9. Valvanera had not maintained records relating to its two years of pompon production prior to the viral infestation. Pub. Doc. 26, at 8. Hectareas and Valvanera provided production data based upon the actual historical experience of other producers in the Agrodex group. Pub. Doc. 29, at 4–5; Pub. Doc. 26, at 8. This data reflects the experience of other farms in the same geographical area, subject to the same environmental factors, operating under common managerial, technical, and marketing guidelines. ITA's choice of BIA rates from similarly situated farms is substantially supported and is sustained.

C. *Cost Data Submitted by Universal, Bachue, and Dianticola:*

FTC argues that the questionnaire responses submitted by Universal, Bachue and Dianticola were "unverified, unexplained and insufficient," and should not be relied upon for purposes of calculating constructed value. According to FTC, ITA should have investigated further or conducted verification procedures, or both.

In conducting a review and making a determination under § 1675(a) of Title 19, as opposed to an initial investigation, verification is required if it is timely requested and no verification has occurred for two consecutive reviews. 19 U.S.C. § 1677e(b)(3) (1988). The last requirement is waivable for cause. *Id.; see also Industrial Quimica Del Nalon, S.A. v. United States,* 14 CIT ____, ____, 732 F. Supp. 1180, 1182 (1990), *interlocutory appeal denied,* 904 F.2d 44 (Fed. Cir. 1990) (table) (ITA is required to verify all information relied upon, if: verification is timely requested; no verification has taken place for two consecutive reviews; and there is a minimal indication of changed circumstances justifying verification).

Apparently, FTC believes the verification is required based on cause. ITA analyzed the information included in the responses of Universal, Bachue and Dianticola, determined that the information was adequate to calculate constructed value, and found no record evidence to support rejection of these responses. *Final Remand Results,* at 6, 9 and 11. FTC produced no evidence to support its claim and its assertions amount to mere speculation. As there was no evidence that respondents' submissions were inaccurate or incomplete, ITA properly accepted the constructed value data submitted by Universal, Dianticola and Bachue without verification.

II

CONDOR'S CHALLENGES

ITA rejected Condor's amortization of pre-production expenses incurred during the period of review for flowers sold thereafter. ITA stated that its "standard methodology at the time of the second administrative

review did not allow for the amortization of pre-production costs incurred before the period under review." *Final Remand Results,* at 10.[2] Condor argues that ITA did not employ this "standard" methodology during the second review. The government agrees with Condor, to the extent that there was no general policy of declining to amortize pre-production costs. The basic methodology employed in the original investigation and the second review, which is at issue, however, was to expense such costs incurred during the period of review. Presumably that is how the costs were treated on the books of most of the respondents. Condor cites four examples of amortization, out of fifty. The government explained that pre-production costs of those respondents were amortized in the ordinary course of business of such respondents and were so reflected in their business records.[3] Thus, the amortization was accepted. In view of Condor's own records which did not reflect amortization and lack of data on atypical production, Condor cannot support a request for amortization.

CONCLUSION

ITA' decision to normalize extraordinary costs related to Hectareas' collapse of the water table and Valvanera's virus attack is supported by substantial evidence. The record further indicates that ITA appropriately accepted the constructed value data submitted by Universal, Bachue and Dianticola. Based on the methodology employed and implicitly approved in the original and second reviews and the information submitted by Condor, ITA was not required to amortize Condor's pre-production costs.

ITA's remand determination is sustained *in toto.*

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[2] This statement is ambiguous. It may mean the *pre-period* expenses were not amortized because the expenses were expected to recur in the current period. In such a case, amortization would be unnecessary. If the costs are stable and consistently expensed or consistently amortized on company books, no distortion should occur. If a company changes its methods, it may create a temporary distortion.

[3] Apparently, there were some minor costs which ITA allowed to be amortized even though they were expensed in business records. ITA apparently did not want to conduct a verification to segregate these expenses. There may have been an error, but as FTC did not complain about this particular item, ITA need not undertake the verification. In any case, this does not entitle *Condor* to the adjustment.

(Slip Op. 92–214)

TIANJIN MACHINERY IMPORT & EXPORT CORP. AND SHANDONG MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND WOODINGS-VERONA TOOL WORKS, DEFENDANT-INTERVENOR

Court No. 91–03–00222

[Plaintiffs' motion for judgment on the agency record and for remand granted in part and denied in part; Remanded in part to the International Trade Commission.]

(Dated December 1, 1992)

Skadden, Arps, Slate, Meagher & Flom, (Rodney O. Thorson, John J. Burke, R. Nicholas Singh), for plaintiffs.

Office of General Counsel, United States International Trade Commission (Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel, and *Abigail A. Shane)* for defendant.

Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III), for defendant-intervenor.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This action comes before the court on plaintiffs' motion for judgment upon the agency record and request for remand. Plaintiffs challenge the final affirmative injury determination by the United States International Trade Commission ("Commission") in *Heavy Forged Handtools From the People's Republic of China,* Inv. No. 731–TA–457 (Final), USITC Pub. 2357 (Feb. 1991). The court sustains the Commission's determination in part and holds that it was supported by substantial evidence. The court also finds that the Commission's determination, in part, was not based upon substantial evidence or in accordance with law, and grants plaintiffs' request for a remand as to the relevant part.

BACKGROUND

Defendant-Intervenor Woodings-Verona Tool Works ("Woodings-Verona"), a United States importer of heavy forged handtools, filed an antidumping duty petition on behalf of the United States industry on April 4, 1990 (the "Petition"). The Petition alleged, in part, that imports of hammers/sledges, bars/wedges, picks/mattocks, and axes/adzes from the People's Republic of China ("PRC") were being sold in the United States at less than fair value. It noted that the PRC had a nonmarket economy.

Plaintiffs, Tianjin Machinery Import and Export Corporation and Shandong Machinery Import and Export Corporation, along with Henan Machinery Import & Export Corporation, are the only three PRC companies that export the subject merchandise.

A copy of the Petition was also filed with the Commission. The Commission instituted a preliminary investigation on April, 11, 1990. *See Heavy Forged Handtools from the People's Republic of China,* Inv. No. 731–TA–457, 55 Fed. Reg. 13673 (ITC 1990).

Commerce also initiated an antidumping investigation. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China,* 55 Fed. Reg. 18364 (Dep't Comm. 1990). Commerce defined the classes or kinds of merchandise subject to investigation as hammers and sledges; bars over 18 inches in length, track tools, and wedges; picks and mattocks; and, axes, adzes, and similar hewing tools.

In April and May, 1990, post-conference briefs were filed by the parties with the Commission. In their post-conference brief, plaintiffs contended that the domestic "like product" definition of bar tools should be enlarged to include bar tools eighteen inches and under. The Commission issued its preliminary determination in May, 1990, and found that imports of the subject merchandise caused material injury to the domestic producers. *See Heavy Forged Handtools From the People's Republic of China,* Inv. No. 731–TA–457 (Preliminary), USITC Pub. 2284 (May 1990). In its preliminary determination, the Commission specifically stated it could not investigate whether to broaden the definition of bar tools because the issue was first raised in post-conference briefs. However, it stated that the issue would be revisited in the final investigation. (*Id.* at 8–11.)

On October 19, 1990, Commerce issued its preliminary determination. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China,* 55 Fed. Reg. 42420 (Dep't Comm. 1990) (prelim. determination). Commerce subsequently issued its final determination on January 3, 1991. In its final determination, Commerce found that heavy forged hand tools from the PRC were being sold in the United States at less-than-fair-value. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China,* 56 Fed. Reg. 241 (Dep't Comm. 1991) (final determination).

The Commission began its final investigation in October, 1990. The Commission sent questionnaires to numerous domestic producers and importers of the subject merchandise. Copies of the questionnaires were provided to all parties in mid December, 1990. The parties filed prehearing briefs in late December, 1990. On January 3, 1991, the Commission held both public and *in camera* hearings in the proceedings. In the *in camera* hearing, the Commission heard testimony regarding Woodings-Verona's financial status. Post-hearing briefs were filed by the parties in early January, 1991.

The Commission issued its final determination in February, 1991. *See Heavy Forged Handtools From the People's Republic of China,* Inv. No. 731–TA–457 (Final), USITC Pub. 2357 (Feb. 1991). In the final determination, the Commission found that the domestic producers of each class of merchandise suffered material injury as a result of imports.

In this court, plaintiffs filed an action challenging Commerce's final determination in *Tianjin Machinery Import & Export Corp. v. United States,* Court No. 91–03–00223, and the action now before this court

challenging the Commission's final determination. In the present proceedings, plaintiffs asserted four challenges to the Commission's final determination. Plaintiffs first claimed that the finding of material injury was not supported by substantial evidence. Secondly, they contended that the Commission failed to terminate the proceedings because a majority of the domestic hewing tools industry did not support the Petition. Plaintiffs also asserted the Commission failed to conduct a sufficient investigation of the domestic bar tool industry. Finally, plaintiffs argued that should plaintiffs prevail in their challenge to Commerce's determination in *Tianjin Machinery Import & Export Corp. v. United States,* Court No. 91–03–00223, the court should remand this action for a redetermination by the Commission based upon corrected dumping margins. However, in the action entitled *Tianjin Machinery Import & Export Corp. v. United States,* Court No. 91–03–00223, the court held Commerce correctly calculated the dumping margins. *See Tianjin Machinery Import & Export Corp. v. United States,* No. 92–195 (CIT 1992). As a result, this court need not address plaintiffs' final objection.

Discussion

A. *Material Injury By Reason of Imports:*

Plaintiffs first asserted that the Commission's finding that the domestic industry was materially injured was not supported by substantial evidence. Plaintiffs argued that domestic producers were in fact "doing relatively well" and only Woodings-Verona did not "thrive" economically during the period of investigation. (Plaintiffs' Confidential Brief in Support of Rule 56.1 Motion for Judgment on the Agency Record ("Plaintiffs' Confidential Brief") at 17.) In support, plaintiffs contended that a financial analysis report showed that domestic producers' [ ]. Plaintiffs also argued that the Commission further ignored extensive evidence that Woodings-Verona suffered from financial difficulties caused by factors unrelated to imports of the subject merchandise. (Plaintiffs' Confidential Brief at 17–20.) Moreover, the Commission neglected to explain in its final determination "why it overlooked th[is] overwhelming evidence." (Plaintiffs' Confidential Brief at 22.)

An antidumping determination will be overturned only if it is not supported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. 1516a (b)(1)(B) (1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *N.A.R. v. United States,* 14 CIT ____, 741 F. Supp. 936, 939 (1990) (quoting *Gold Star Co. v. United States,* 12 CIT 707, 708–709, 692 F. Supp. 1382 (1988) *aff'd,* 8 Fed. Cir. (T) ____, 873 F.2d 1427 (1989)). *See also Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 50, 592 F. Supp. 1318 (1984).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966). This standard of review accords deference to an

agency's conclusions. It is not the court's function to decide that it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927 (1984). The court will affirm the determination of the Commission when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence. *Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556 (1984).

In an antidumping or countervailing duty investigation, the Commission is charged with determining whether:

> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports * * *.

19 U.S.C. §§ 1671d(b)(1) (1988) and 1673d(b)(1) (1988).

The legislative history of the Trade Agreements Act of 1979 specifically provides that "in examining the overall injury to a domestic industry, the [Commission] will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports. However, the petitioner will not be required to bear the burden of proving * * * that material injury is not caused by such other factors." S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979), *reprinted in* 1979 U.S.C.C.A.N. 461. Moreover, the Commission "is not required to weigh the extent of injury from imports against the extent of injury from other causes, if they exist. The essence of its duty is to discern whether or not the imports are a cause of material injury to the industry." *Atlantic Sugar, Ltd. v. United States,* 2 CIT 18, 24, 519 F. Supp. 916 (1981) (citation omitted).

The court must therefore determine whether substantial evidence supported the Commission's finding that the domestic industry *as a whole* suffered material injury from imports. This court is not empowered with the responsibility, as plaintiffs suggest, of evaluating whether plaintiffs' alternative construction of the evidence is more persuasive. Specifically, the court is not authorized to determine whether factors unrelated to imports contributed, in whole or in part, to *Woodings-Verona's* financial condition.[1]

In making its material injury determination under 19 U.S.C. §§ 1671d(b)(1) (1988) and 1673d(b)(1) (1988), the Commission:

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[1] Accordingly, the Commission is not required to explain in its final determination why it "overlooked" evidence concerning the cause of Woodings-Verona's financial problems. "The Commission is * * * presumed to have considered all of the evidence in the record especially where the facts allegedly ignored were presented at an open hearing." *Metallverken Nederland B.V. v. United States,* 13 CIT 1013, 1021, 728 F. Supp. 730 (1989) (citations omitted). In this action, plaintiffs fully presented their arguments to the Commission in both public and *ex parte* hearings conducted on January 3, 1991. (Public Record, Document No. 165; Confidential Record, Document No. 28.) Consequently, the Commission is presumed to have considered the data when determining whether the domestic industry as a whole suffered material industry by reason of imports, and need not distinguish every shred of divergent evidence.

(i) shall consider –

(I) the volume of imports of the merchandise which is the subject of the investigation,

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B)(i) & (ii) (1988).

In regard to the volume of imports factor, the Commission must consider whether the volume of subject imports, or any increase in that volume is significant. 19 U.S.C. § 1677(7)(C)(i) (1988). When evaluating the effect of the imported merchandise on prices, the Commission must determine whether significant price underselling of the subject merchandise occurred or whether imports otherwise significantly depressed prices. 19 U.S.C. § 1677(7)(C)(ii) (1988).

In examining the impact of the imports on domestic producers of like products, the Commission must evaluate:

all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to –

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii) (1988).

None of the statutory factors are "necessarily dispositive of the question of material injury. The [Commission] is obligated to weigh all the pertinent evidence gathered in an investigation in reaching a determination." *Roses, Inc. v. United States,* 13 CIT 662, 665, 720 F. Supp. 180 (1989). "The Commission has broad discretion to ascertain which economic factors are relevant in an investigation, and the weight to be given those factors." *Metallverken Nederland B.V. v. United States,* 13 CIT at 1019.

For each class of merchandise, the Commission found that both the domestic industry as a whole was materially injured, and that the injury

was a result of the subject imports based on the factors contained in 19 U.S.C. § 1677(7)(B). The court finds that each of these determinations was supported by substantial evidence.

First, the Commission properly analyzed whether the four domestic industries were in fact materially injured. The Commission correctly based its determination on the economic factors that have a bearing on the status of the United States industry as specified in 19 U.S.C. § 1677(7)(C)(iii).

Moreover, substantial evidence supported the Commission's conclusion that although certain economic trends were mixed, the fact that "apparent consumption, domestic production, capacity utilization, and domestic shipments almost all declined for all four industries from the interim period of 1989 to the interim period of 1990" showed that the domestic industries suffered material injury. *Heavy Forged Handtools From the People's Republic of China,* USITC Pub. 2357 at 25 (1991). For example, apparent domestic consumption of digging tools decreased significantly in both quantity and value terms from 1989 through 1990. (*Id.* at 23, A–39.) Domestic capacity utilization of hewing tools likewise declined from 1988 through 1990. (*Id.* at 23) The quantity and value of domestic shipments of bar tools and digging tools also continued to decline sharply in 1989. (*Id.* 22, 23.)

Moreover, the Commission's determination that "the declining overall profitability of the producers, particularly their poor return on fixed and total assets" indicated material injury was also supported by substantial evidence. *Id.* at 25. Specifically, in addition to meager returns on both fixed and total assets, net sales for overall establishments of the producers decreased from 1989 to 1990, and from the interim periods of 1989 to 1990. (*Id.* at 24, A–26) Operating income, operating income margins, gross profits, and gross profits as a share of net sales likewise declined. (*Id.* at 24, A–23.)

The Commission's determinations that the industries were injured "by reason of" the subject imports was also supported by substantial evidence. In regard to striking tools, the Commission found that evidence concerning both the statutory volume and effects factors contained in 19 U.S.C. § 1677(7)(B) (1988) demonstrated that dumping of the subject merchandise was a cause of material injury to the domestic industry. Evidence demonstrated that imports of the merchandise "increased dramatically" between 1987 through 1989. *Heavy Forged Handtools From the People's Republic of China,* USITC Pub. 2357 at 26, A–33 (1991). Market penetration also increased by approximately 25 percent both in quantity and value terms. (*Id.* at 27.) Moreover, while price comparisons of certain sledgehammers revealed undercutting and overselling, other sledgehammers and a second imported striking tool were consistently undersold.[2] (*Id.* at 27, A–50–51.)

[2] Plaintiffs argued that evidence of mixed overselling and underselling prevented a finding by the Commission of significant price undercutting. However, "[i]nstances of overselling do not preclude the Commission from finding significant or pervasive underselling." *Metallverken Nederland B.V. v. United States,* 13 CIT at 1024. As a result, the Commission may find, as it did here, that extensive price undercutting existed along with overselling.

Similarly, the Commission properly determined that domestic producers of bar tools suffered material injury by reason of imports. Evidence indicated that the quantity and value of imports of bar tools "increased sharply" from 1987 through 1989. *Id.* at 28, A–33. Market penetration of the merchandise measured in quantity and value terms remained constant from 1987 to 1988, then increased in excess of 40 percent from 1988 through 1989. (*Id.* at 28, A–11.) Price comparisons of two domestic bar products with comparable Chinese products were inconclusive, however, since 15 of 30 quarterly price comparisons showed underselling while 15 revealed overselling. (*Id.* at 28, A–51–52.) The Commission, however, maintains "broad discretion to ascertain which economic factors are relevant * * * and the weight to be given those factors." *Metallverken Nederland B.V. v. United States*, 13 CIT at 1019. Consequently, because economic factors other than price comparisons sufficiently indicated material injury by reason of imports, substantial evidence supported the Commission's finding that domestic producers of bar tools suffered material injury due to imports.

Substantial evidence further supported the Commission's determination that producers of digging tools were also materially injured as a result of imports. Imports "increased constantly from 1987 to 1989, both in terms of value and quantity." *Heavy Forged Handtools From the People's Republic of China*, USITC Pub. 2357 at 28–29, A–33 (1991). Market penetration likewise "started at a high level in 1987 and increased by approximately one-third from 1987 to 1989." *Id.* at 29, A–39. Additionally, all price data showed underselling by the imported product. (*Id.* 29, A–53.)

Finally, the Commission correctly determined that sales of hewing tools at less-than-fair-value materially injured the domestic industry. Imports of the merchandise increased penetration rose "almost thirty percent from 1988 to 1989" in volume, while in value terms, it "increased by nearly sixty percent * * * from 1988 to 1989." *Id.* at 29, A–39. Moreover, all price comparisons revealed substantial underselling by the imported product. (*Id.* at 30, A–54.)

None of the evidence cited by plaintiffs in their brief even marginally negated the credibility of the information upon which the Commission relied in finding that domestic producers as a whole suffered material injury as a result of sales at less-than-fair-value of the imported merchandise. Moreover, the evidence referred to by plaintiffs did not show that the Commission abused its broad discretion in determining which statutory factors were relevant in the investigation, or the weight to be given each factor. The court therefore finds that substantial evidence supported each of the Commission's determinations that the domestic industry of each class of merchandise suffered material injury by reason of imports.

B. *Failure to Terminate the Investigation:*

Plaintiffs next asserted that the Commission erred by failing to terminate the proceeding regarding hewing tools because a majority of the do-

mestic hewing tools industry did not support the Petition. Plaintiffs based their argument on 19 U.S.C. § 1673a(b) (1988) which mandates that an antidumping petition must be filed "on behalf of an industry." Plaintiffs contended that this statute is in effect a jurisdictional "standing" requirement, and "petitioner's standing to be before "standing" requirement, and "petitioner's standing to be before an agency is a prerequisite for the assertion of jurisdiction by the agency." (Plaintiffs' Confidential Brief at 26.) Accordingly, the Commission is "affirmative[ly] obligat[ed] to determine the standing of petitioners in antidumping actions." (Plaintiffs' Confidential Brief at 26.)

Plaintiffs argued that a majority of the domestic hewing tool industry did not support the Petition because [ ], a significant producer of hewing tools, informed the Commission on November 30, 1990 in its questionnaire responses that it opposed the Petition. (Confidential Record, Document No. 45.10, at 5.) Consequently, since a majority of the domestic industry opposed the Petition, neither Commerce nor the Commission had jurisdiction to proceed with the investigation. Plaintiffs concluded that the Commission erred by failing to dismiss the hewing tool proceeding as a result of [ ] questionnaire response, or by failing to immediately inform Commerce of the opposition to the Petition.

The Commission's final determination was silent on the issue of [ ] opposition to the Petition, and provided no explanation of the Commission's apparent decision that termination of the hewing tool proceeding was not warranted. As a result of the Commission's failure to provide any indication of the course of conduct pursued after receiving [ ] opposition, the Court finds that the Commission's final determination regarding hewing tools was not supported by substantial evidence. The court therefore remands this action to the Commission. Upon remand, the Commission is instructed to specify the course of conduct taken as a result of the opposition filed by [ ] and the underlying reasons for its actions. The Commission is specifically directed to provide an explanation for any determination, should one have been made, that the statutory language "on behalf of" contained in 19 U.S.C. § 1673a(b) was not a traditional, jurisdictional standing requirement, or any conclusion that the authority or obligation for determining that the petition was filed "on behalf of" the domestic industry lay with Commerce, and not the Commission.

C. *Investigation of Bar Tools Industry:*

Plaintiffs also challenged the Commission's investigation of the bar tools industry. In the Petition, Woodings-Verona alleged that the domestic "like product" pursuant to 19 U.S.C. §§ 1677(4)(A), 1677(10) (1988) for the imported bar tools subject to the investigation included only bar tools longer than eighteen inches. The Commission ultimately determined, however, that the domestic "like product" also included bar tools eighteen inches and under. Plaintiffs asserted for the first time in this appeal that, nevertheless, the Commission failed to "collect critical information, including pricing data and the identification of all produc-

ers" regarding bar tools eighteen inches and shorter. (Plaintiffs' Confidential Brief at 32.)

Title 28 of the United States Code, Section 2637(d) (1988) provides that this court "shall, where appropriate, require the exhaustion of administrative remedies."

"A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission of Alaska v. Argon,* 329 U.S. 143, 155 (1946). "[T]o preserve an issue for judicial review it must have been raised at the administrative level 'at the time appropriate under [the agency's] practice.'" *Al Tech Specialty Steel Corp. v. United States,* 11 CIT 372, 376, 661 F.Supp 1206 (1987) (quoting *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952).

Several exceptions to the exhaustion of remedies doctrine exist, including when "requiring exhaustion would be futile, a useless formality, or pursuit of a manifestly inadequate remedy." *Wieland Werke, AG v. United States,* 13 CIT 561, 567, 718 F. Supp. 50 (1989). Exceptions have also been permitted when judicial interpretations of existing law were decided after the contested administrative determination, or where the agency did not adhere to controlling precedents. *Id.*

In the instant case, the Commission notified plaintiffs by December, 1990 of the products for which pricing data had been gathered. Plaintiffs were additionally provided with copies of producer questionnaires at that time, and with the Commission's Pre-Hearing Report. (Confidential Record, Document Nos. 13, 46E, 46G, 46H.) Plaintiffs therefore had sufficient opportunity to provide the Commission with objections to the bar tools investigation prior to the filing of the Commission's final determination in February, 1991. Nevertheless, plaintiffs failed to notify the Commission of their objections to the investigation, and deprived the Commission of the opportunity to "consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission of Alaska v. Argon,* 329 U.S. at 143. Further, none of the judicially recognized exceptions to the exhaustion of remedies doctrine apply in this case. The court finds therefore that plaintiffs are estopped from challenging the investigation of the Commission regarding bar tools eighteen inches and under.

CONCLUSION

For the reasons provided above, this court holds that the Commission's final determination regarding heavy forged handtools from the PRC was, in part, supported by substantial evidence and in accordance with law. Accordingly, Commerce's determination is sustained in part, and plaintiffs' motion for remand is granted in part.

(Slip Op. 92–215)

SILVER SEIKO, LTD., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANT

Court No. 91–04–00281

[Action dismissed for lack of prosecution.]

(Decided December 2, 1992)

Willkie Farr & Gallagher (*Christopher A. Dunn, Barbara K. Summers* and *Daniel L. Porter*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael S. Kane*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Mary Patricia Michel*) for the defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Todd C. Fineberg*) for the intervenor-defendant.

AQUILINO, *Judge:* This action, which was commenced in April 1991, challenges *Portable Electric Typewriters From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 14,072 (April 5, 1991).

After joinder of issue, the filing of the record compiled in that administrative proceeding, and the passage of sufficient time for the parties to familiarize themselves with the entire contents thereof, the court called upon counsel in March 1992 to propose a mutually-acceptable scheduling order for disposition of the action. Counsel for the plaintiff responded that they were in receipt of a letter from the attorney for

> Brother Industries Ltd. requesting an extension of the scheduling order in Cases 91–05–00358 and 91–05–00344 until thirty days after the court's decision in CIT No. 88–11–00860. Although Silver's case has not been consolidated with Cases 91–05–00344 or 91–05–00358, it arises out of the same determination by the United States Department of Commerce and concerns the same defendant-intervenor as well as many similar issues as are in those cases. Therefore we ask that the Court grant an extension of time for filing a briefing schedule in our case, 91–04–00281, to correspond to whatever delay it grants in Cases 91–05–00344 and 91–05–00358.
>
> We believe that placing the three cases on the same schedule serves judicial economy by avoiding unnecessary duplication of effort and piecemeal litigation. We have contacted the attorney for defendant-intervenor, * * * who strongly concurs in this request. Counsel for Defendant * * * also concurs in this request.
>
> Accordingly, we ask that the Court defer the time for filing a briefing schedule in Court No. 91–04–00281 until the date it sets for filing a briefing schedule in Court Nos. 91–05–00344 and 91–05–00358.

This proposed approach was acceptable to the court at the time. Since then, the matter referred to, namely, *Brother Industries, Ltd. v. United States,* CIT No. 88–11–00860, has been finally resolved pursuant to Slip Op. 92–121, 16 CIT ___ (July 28, 1992), and Slip Op. 92–176, 16 CIT ___ (Oct. 14, 1992).

On October 16, 1992, the court directed the parties in the above action (and in the referenced actions numbered 91–05–00344 and 91–05–00358) to propose scheduling orders on or before November 2, 1992. The parties in those other actions have complied. In doing so, they indicated that counsel for the plaintiff herein would contact the court directly.

The plaintiff, however, has not presented to date anything tending to indicate a desire now to proceed, whereupon the court is constrained to conclude that this action must be dismissed for lack of prosecution. Judgment of dismissal will enter accordingly.

ABSTRACTED CLASSIF

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESS
C92/191 11/25/92 Restani, J.	Dart Express (SFO) Inc.	92–2–00119	9011.10.800 9%
C92/192 12/3/92 Restani, J.	Astec USA (HK), Ltd.	88–8–00673	682.60 3.6% or 3%
C92/193 12/3/92 DiCarlo, C.J.	Mattel, Inc.	86–2–00263	737.95 10.9%

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